87-2072

Supreme Court, U.S.
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Case Number: _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

HOWARD YOUNG,

Petitioner,

vs.

GENERAL FOODS CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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SUPREME COURT, U.S.

QUESTION PRESENTED

Where an employee suing under the Age Discrimination in Employment Act, 29 U.S.C. Section 623 et seq. presents a prima facie case of discrimination and the employer articulates a legitimate non-discriminatory reason for the discharge of the plaintiff, what evidentiary showing is sufficient for the plaintiff to defeat summary judgment in favor of the employer?

CERTIFICATE OF INTERESTED PARTIES

I hereby certify that:

1. The judge below was the Honorable Howell W. Melton.

2. Plaintiff below, petitioner in this court, is Howard Young.

3. Counsel for plaintiff below, petitioner in this court, is John F. MacLennan, of Kattman, Eshelman & MacLennan, P.A.

4. Defendant below, respondent in this Court, is General Foods, Incorporated.

5. Counsel for defendant below, respondent in this court, is Patricia M. Sabalis, Esquire, General Foods Corporation.

6. Counsel for defendant below, respondent in this court, is William A. Bald, Esquire, of Dale and Bald, P.A.

Respectfully submitted,

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CITES TO THE DISTRICT COURT AND COURT OF APPEALS

The opinion of the district court is unpublished. The opinion of the court of appeals is published at 840 F.2d 825 (11th Cir. 1988).

STATEMENT OF GROUNDS ON WHICH JURISDICTION INVOKED

The final judgment by the District Court was entered on June 9, 1987. The decision of the Court of Appeals, Eleventh Circuit, affirming the District Court was entered on March 21, 1988.

Petitioner is authorized to seek review of this matter by Rule 17, Rules of the United States Supreme Court and 28 U.S.C Section 2101.

STATUTES AND REGULATIONS INVOLVED

The Age Discrimination in Employment Act, 29 U.S.C. 623 et seq.

The text of the relevant statutory provisions is found in the appendix to this petition.

STATEMENT OF THE CASE AND THE FACTS

This action was brought by plaintiff, Howard Young, ("Young") alleging that his termination from employment with defendant, General Foods Corporation, ("General Foods") on December 1, 1983 was in violation of the Age Discrimination in Employment Act, ("ADEA"). Suit was filed on August 26, 1986 in the Middle District of Florida, Jacksonville Division. General Foods' Motion for Summary Judgment was granted on June 9, 1987. Young filed his Notice of Appeal to the United States Court of Appeals, Eleventh Circuit on June 23, 1987. The Court of Appeals affirmed the District Court's summary judgment in favor of General Foods by order entered March 21, 1988.

At the time of his termination, Young was

replaced by John Curran, who was 26 years old at that time. He had worked for General Foods for over 23 years the last twenty (20) of which were in essentially the same sales representative position. Young's supervisor for over 18 years was Mr. Robert Bell. Mr. Bell was replaced as Young's supervisor by Mr. John Biltgen approximately 20 months prior to Young's termination.

Young's sales performance for fiscal year 1982 was the best in the region. Young's fiscal year 1983 figures showed his area growth was up 8.8% as opposed to a regional increase of 8.9%.

Biltgen deleted a commodity known as CRYSTAL LIGHT from Young's sales figures which lowered Young's

standings in relation to the other sales personnel. Young usually ranked in the middle among the other territorial sales managers who were his peers with General Foods.

In October of 1982, Young was complimented by General Foods National Sales Manager for his excellent distribution and shelving of General Foods products.

Biltgen referred to Young as "not proactive", "not aggressive". Biltgen stated that Young "moved in slow motion" and "did not have wherewithal" to perform his job. Biltgen also compared Young's age to that of Biltgen's father. Young stated by affidavit that he understood those comments to refer to his age because of the context in which they were spoken. Biltgen advised Young that Biltgen would

change his mind concerning Young's termination if Young would retire early the next year.

The Court of Appeals in its decision held that the trial court properly granted summary judgment in favor of General Foods because General Foods had articulated a legitimate non-discriminatory reason for discharging Young (poor job performance) and Young had failed to introduce sufficient evidence of pretext to defeat summary judgment.

BASIS FOR FEDERAL JURISDICTION

Young's suit invoked federal jurisdiction pursuant to the Age Discrimination in Employment Act, 29 U.S.C. Section 623 et seq.

ARGUMENT

THIS COURT SHOULD DETERMINE WHETHER IN AN ACTION CLAIMING AGE DISCRIMINATION SUMMARY JUDGMENT IS PROPERLY ENTERED FOR THE EMPLOYER WHERE CONFLICTING EVIDENCE IS PRESENTED AS TO WHETHER THE PURPORTED REASON FOR THE PLAINTIFF'S DISCHARGE WAS THE ACTUAL REASON.

As the Eleventh Circuit noted, in the instant action Young presented a prima facie case pursuant to McDonnell Douglas v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) by showing that he was 59 years of age at the time of his termination, was discharged, and was replaced by someone less than 40 years of age. The Eleventh Circuit noted that since Young had held his position for some period of time, it would be inferred that his job performance was sufficiently

satisfactory to present a prima facie case, disagreeing with the District Court's determination that Young had failed to prove a prima facie case because of that element.

General Foods raised the issue of inadequate job performance as its purported legitimate non-discriminatory reason for discharging Young. As noted by this court in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 96 L.Ed.2d 1554 (1981) once the employer has articulated such a reason, the burden shifts to the plaintiff to demonstrate the purported reason given is pretext for prohibited discrimination. This court in Burdine held that plaintiffs in a discrimination case may demonstrate pretext either directly by persuading the court that a

discriminatory reason more likely motivated the employer or indirectly by showing that the employer's profferred explanation is unworthy of credence. (101 S.Ct. at 1095)

This court in Burdine went on to observe that in certain cases the plaintiff may be able to demonstrate pretext simply by the evidence presented to show a prima facie case plus effective cross-examination of the employer's witnesses. Naturally, since summary judgment was entered against Young, he was deprived of the opportunity of cross-examining the employer's witnesses to demonstrate pretext.

Young respectfully submits that the summary judgment in this action was improperly granted since the jury, as the sole judge of credibility of

evidence, could have concluded that the "employer's profferred explanation is unworthy of credence".

Young submits that the proper role of summary judgment in an employment discrimination case was set forth by the Fifth Circuit in Thornbrough v. Columbus and Greenville Railroads, Co., 760 F.2d 633 (5th Cir. 1985). In that case, the Fifth Circuit noted how rare it was for a plaintiff in an age discrimination case to have direct evidence of discrimination. The Fifth Circuit then quoted this court's decision in Burdine with respect to the two methods by which an employee may demonstrate that the articulated reasons for discharge are pretextual. The Fifth Circuit went on to state

> "In general, summary judgment is an inappropriate

> tool for resolving claims of employment discrimination, which involve nebulous questions of motivation and intent. . . .
>
> Often motivation and intent can only be proved through circumstantial evidence; determinations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of a fact finder. . . . Thus, if any facts are in dispute, summary judgment is generally inappropriate.

Young, as did the plaintiff in Thornbrough, questions the objective truth of the so-called legitimate reason for his termination, i.e. poor job performance. Young points to his long service with General Foods prior to Biltgen becoming his supervisor which included numerous raises and bonuses. Young further pointed to Biltgen's manipulation of the figures to reduce Young's standings among his peers. Young also testified that his

performance was generally near the middle of the pack, if not above, among his peers.

In a case previously decided by the Eleventh Circuit, remarkably similar to Young's, Rosenfield v. Wellington Leisure Products, Inc., 827 F.2d 1493 (11th Cir. 1987) the plaintiff was a salesman fired for alleged poor job performance. The Eleventh Circuit in reversing a judgment NOV for the defendant stated at page 1496:

> "Wellington sought to prove that Rosenfield was fired because his job performance was unsatisfactory. The company submitted evidence that division Vice President, Dave Paulin, was disappointed in plaintiff's product and merchandising knowledge and plaintiff had been duly criticized by Paulin during his annual evaluation. Plaintiff was further criticized by Gary Kilgos, plaintiff's former peer and new supervisor, having replaced Dave Paulin, who

had been promoted. Kilgos testified at trial that he had observed improper product and display designs by plaintiff. He also complained that Rosenfield had not timely completed a particular project. There was further evidence that a client had called Paulin and Kilgos to complain about Rosenfield's inattention to details and inaccuracies in information furnished by Rosenfield. On the evidence established that plaintiff made several errors in obtaining his quotes on manufacturor's present price quotations and listing of brand names and descriptions of products."

The plaintiff in Rosenfield presented evidence he was a good salesman based upon bonuses and praise from the national accounts manager. Rosenfield had been hired at 51 and fired at 53 his replacement was 36, facts less compelling than Young, who worked for General Foods for over 23 years, was 59 at the time of his discharge and was replaced by someone less than 30 years

of age.

The Eleventh Circuit stated:

> "A jury which believed this testimony might very well conclude that Wellington's description of an incompetent salesman was anything but accurate."

The court concluded that where credible evidence existed that the plaintiff was a satisfactory salesman, a jury verdict for the plaintiff would be upheld.

Other courts of appeal have properly held that the issue of pretext in ADEA cases is generally for the finder of fact. In Gilkerson v. Toastmaster, Inc., 770 F.2d 133 (8th Cir. 1985) the court held that the mere articulation of an alleged legitimate non-discriminatory reason does not entitle the defendant to a judgment NOV. All of the evidence in the case

may allow the jury to find in favor of the plaintiff.

In Reeves v. General Foods, Corp., 682 F.2d 515 (5th Cir. 1982) the court of appeals affirmed a jury verdict in favor of the plaintiff. The defendant had articulated a legitimate non-discriminatory reason but the court noted at page 524 that the jury could have disbelieved the evidence presented by the defendant that the plaintiff was an inadequate sales representative. The court, holding as the Eleventh Circuit had in Rosenfield, at page 523 noted that if there was sufficient evidence for a jury to conclude that the plaintiff was not a poor performer then the issue of pretext was for the jury.

In Stacey v. Allied Store Corp., 768 F.2d 402 (D.C. Cir. 1985), the court stated at page 408 that if the

defendant's witnesses were simply not believed by the jury, then the evidence on pretext would be sufficient to create a jury question and therefore a JNOV was not appropriate.

Young submits that the courts in Rosenfield and Thornbrough properly held that where the non-discriminatory reason advanced for discharge is poor job performance and the evidence is such that a jury could conclude that the plaintiff was not in fact a poor performer, then the issue of pretext is one to be determined by the jury and neither a JNOV nor summary judgment is appropriate.

This Court clearly held in Burdine that pretext may be shown either directly or indirectly. Where the profferred legitimate reason for

discharge is poor job performance, yet evidence of record is such that a jury could reasonably conclude the plaintiff was not a poor performer, then the issue must be resolved by a jury. The decision in Young's case granting summary judgment is thus incorrect as a matter of law. This Court should grant the petition for certiorari and consider the issue raised by the petitioner.

CONCLUSION

The ruling of the court of appeals in this case violates this Court's decision in Burdine which held that pretext may be proven not only directly but indirectly by demonstrating that the employer's profferred explanation is not worthy of credence. Since the finder of fact is to make all judgments on credibility, and since the evidence of record in Young's case is

such that a reasonable jury could well conclude that Young was not a poor performer so as to justify discharge, the summary judgment was inappropriate.

Young's petition raises important and serious questions as to when summary judgment is appropriate in an employment discrimination action pursuant to the ADEA. This Court should therefore grant the petition and consider the issues raised by the petitioner on the merits.

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused three copies of the foregoing Petition for Writ of Certiorari to be served on each counsel for respondent, by first-class mail, postage prepaid as follows:

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Howard YOUNG, Plaintiff-Appellant,

v.

GENERAL FOODS CORPORATION,
Defendant-Appellee.

No. 87-3479.

United States Court of Appeals,
Eleventh Circuit.

March 21, 1988.

Employee brought age discrimination against employer. The United States District Court, Middle District of Florida, NO. 86-900-CIV J-12, Howell W. Melton, J., granted summary judgment for employer. Employee appealed. The court of Appeals, Tuttle, Senior Circuit Judge, held that: (1) comments that employee lacked wherewithal to perform job, moved in slow motion, and was not proactive or aggressive, did not constitute direct evidence of discrimination; (2) employee

failed to establish that employer's asserted reason for termination, poor job performance, was pretextual; and (3) employer's offer of retirement was not probative of discriminatory intent. Affirmed.

In cases brought under the Age Discrimination in Employment Act, plaintiff bears ultimate burden of proving that age was determinative factor in employer's decision to terminate employment. Age Discrimination in Employment Act of 1967, Sections 2-17 as amended, 29 U.S.C.A. Sections 621-634.

If employee establishes prima facie case of age discrimination by producing direct evidence of discriminatory intent, burden shifts to employer to prove that same employment decision would have been reached even

absent any discriminatory intent. Age Discrimination in Employment Act of 1967, Sections 2-17 as amended, 29 U.S.C.A. Sections 621-634.

If employee establishes prima facie case of age discrimination by proving that employee was member of protected group was discharged, was replaced with persons outside protected group, and was qualified to do job, burden shifts to employer to articulate legitimate, non-discriminatory rationale for discharge; if employer does so, burden shifts back to employee to prove that employer's asserted reason was pretextual. Age Discrimination in Employment Act of 1967, Sections 2-17 as amended, 29 U.S.C.A. Section 621-634.

Remarks that employee lacked wherewithal to perform job, moved in

slow motion, was not proactive or aggressive, and was approximately the same age as manager's father did not constitute direct evidence of age discrimination; rather remarks at most referred only to characteristics sometimes associated with increasing age and were not directly probative of intent to discriminate. Age Discrimination in Employment Act of 1967, Sections 2-17 as amended, 29 U.S.C.A. Section 621-634.

Employee, who had been employed as territory sales manager, failed to establish, in age discrimination action, that employer's asserted reason for termination, poor job performance, was pretextual; employee did not dispute evaluation figures critical of his budget figures, conscientiousness, and performance of administrative tasks, and

employee conceded that, after being requested to do so, he failed to submit any merchandising ideas or conduct any business review presentations. Age Discrimination in Employment Act of 1967, Sections 2-17 as amended, 29 U.S.C.A. Section 621-634.

Employer's offer of retirement was not probative of discriminatory intent, in age discrimination action; employer had decided to fire employee before offering him alternative choice of retirement. Age Discrimination in Employment Act of 1967, Sections 2-17 as amended, 29 U.S.C.A. Section 621-634.

Appeal from the United States District Court for the Middle District of Florida.

Before HILL and JOHNSON, Circuit

Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

This case involves a complaint filed under the Age Discrimination in Employment Act of 1967, Sections 2-17 as amended, 29 U.S.C. Sections 621-634. The district court granted summary judgment to the employer, holding that the employee had failed to establish pretext, an element essential to his case. We affirm.

I. STATEMENT OF FACTS

Howard Young began working for General Foods Corporation in 1960. Three years later, Young became a Military Sales Representative in the company's Military Sales Division, responsible for the area including Jacksonville, Florida. In 1981 Young and the other Military Sales

Representatives were "upgraded" to the position of Territory Sales Managers (TSMs). In November 1982, Young was placed on probation for poor work performance and on December 1, 1983 he was fired. Young was 59 years old at the time of termination. He was replaced by a man 26 years old.

During much of his tenure at General Foods, Young's supervisor was Robert Bell. Young received raises and bonuses during this period, although the bonuses were given in equal amounts to all TSMs in a region based on overall region, rather than individual territory, performance. However, Young's affidavit contains a performance appraisal written by Bell in 1981 that stated that Young had not met his budget for two quarters of the fiscal year, had

a "tendency to become lax at times," and had failed to complete specific assignments and satisfactorily perform administrative tasks associated with his job.

In April 1982, John Biltgen replaced Bell as the Area Regional Sales Manager for the southeast region. Between April and November 1982, Young and Biltgen had several disagreements. Among other things, the pair disagreed over the value of making formal sales presentations. Several times Biltgen asked Young to develop a plan of action in that area; however, Young continued to rely solely on his past relationships with commissary officials in order to make sales. Biltgen also continued Bell's practice of formulating written "contracts" with each TSM. The initial agreement between Biltgen and Young,

developed in April, identified goals in the areas of sales volume, business growth, personal development, and cost effectiveness. On October 28, 1982, Biltgen completed a six-month written evaluation of information showing that the sales volume growth and "budget accomplishment" in Young's area trailed that of the region average. Biltgen criticized Young's "[p]resentations of new ideas" and stated that Young was "not proactive in the presentations, following through or shelving of new items." A listing of new items to be distributed also indicated that Young had not met his distribution objectives, which resulted in some of Young's customers being the only ones in the region not to stock certain items. In the "business building" area, Biltgen

criticized Young's lack of account development, noting that Young had neither developed a strategy to improve business nor submitted any merchandising ideas. Finally, Biltgen wrote that Young was "not maximizing volumes because of [his] non-aggressive/non-proactive posture" and that Young was "not managing in an aggressive manner and his trust level ha[d] been severely damaged." Excepting some of the sales figures, Young did not dispute Biltgen's comments contained in the evaluation.

Consequently Biltgen placed Young on probation effective November 22, 1982. Under the probationary terms, Young would be subject to termination unless he showed "substantial progress" by March 1, 1983. In a May 1983 evaluation, Biltgen reviewed Young's status and concluded that, instead of

being terminated, Young would "remain on formal probation with employment being extended on a month-to-month basis." At this time the majority of Young's sales and budget figures continued to be below the average for the region, prompting Biltgen to opine in the evaluation that "[t]here is . . . the feeling . . . that [Young] was not being proactive enough in going belly to the bar with new items and following up accordingly." In Young's final evaluation of November 10, 1983, Biltgen wrote that some of Young's customers continued to be the only ones not stocking certain items, that Biltgen himself had been forced to make certain presentations that should have been completed by Young, and that Young had yet to present any ideas for building business. Biltgen also noted that

Young's damaged merchandise expenses were the highest in the region. Prior to the final evaluation Young's budget accomplishment and volume figures had improved vis-a-vis the region; however, the improved volume performance resulted almost exclusively from sales of CRYSTAL LIGHT beverage. Because Young's territory was the only one merchandising the beverage, Biltgen recomputed Young's volume figures without CRYSTAL LIGHT sales in order to obtain a more accurate picture of Young's performance relative to the other TSMs in the region. The recomputed figures placed Young last in the southeast.

Approximately two weeks before filing the final evaluation, Biltgen informed Young that Young would be terminated prior to December 31, 1983. On November 14, 1983, Biltgen drafted a

memorandum notifying Young of his termination, effective that date. On November 21-22, 1983, Biltgen met with Young and attempted to persuade Young to retire instead. When Young refused to do so, Biltgen again terminated him, effective December 1, 1983.

Subsequently, Young filed suit against General Foods, claiming that Biltgen's actions showed an intent to discriminate against Young because of age. Young pointed specifically to Biltgen's deletion from volume figures of Young's sales of CRYSTAL LIGHT, Biltgen's remarks that Young lacked the "wherewithal" to perform in his job, "moved in slow motion," and "was not proactive" and "not aggressive." Young also stated that Biltgen had made a remark comparing Young's age with that

of Biltgen's father. The district court granted summary judgment to General Foods, however, holding that Young had neither produced direct evidence of discrimination nor evidence of pretext undermining the employer's assertion that he was fired because of poor job performance. From that decision Young now appeals.

II. DISCUSSION

Young contends that the district court erred not considering some of Biltgen's remarks to constitute direct evidence of discrimination. Young also argues that he established a prima facie case under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d. 668 (1973) and raised a genuine issue of material fact regarding whether General Foods' rationale for his termination was pretextual. General

Foods asserts that Young presented neither direct evidence of discrimination nor sufficient evidence of pretext to withstand a motion for summary judgment. We agree that Young presented insufficient evidence of age discriminations to require submission of the case to a jury and that summary judgment for General Foods, therefore, was appropriate.

A. Introduction

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be rendered if "there is no genuine issue as to any material fact and [if] the moving party is entitled to a judgment as a matter of law." According to the Supreme Court:

> "[T]he plain language of Rule 56(c) mandates the entry of

> summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial."

Celotex Corp. v. Catrett, 477 U.S. 317, ---, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The Court also has noted that "there is no issue for trial unless

there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242 --, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986),(citations omitted); see Barnes v. Southwest Forest Indus., inc., 814 F.2d 607, 609 (11th Cir. 1987) (quoting standards for granting summary judgments and directed verdicts).

[1-3] In cases brought under the age Discrimination in Employment Act (ADEA), the plaintiff bears the ultimate burden of proving that age was a determinative factor in the employer's decision to terminate his employment. See Anderson v. Savage Laboratories, Inc., 675 F.2d 1221, 1224 (11th Cir. 1982). Initially,

a plaintiff must establish a prima facie case of age discrimination. One such way is to produce direct evidence of discriminatory intent. If a plaintiff produces direct evidence, the employer must then prove that the same employment decision would have been reached absent any discriminatory intent. See Buckley v. Hospital Corp. of America, 758 F.2d 1525, 1529-30 (11th Cir. 1985). Alternatively, a prima facie case may be shown by proving that the plaintiff (1) was a member of the protected group, (2) was discharged, (3) was replaced with a person outside the protected group, and (4) was qualified to do the job. See id. at 1520 (discussing the McDonnell Douglas test). If a plaintiff establishes a prima facie case under McDonnell Douglas, the employer must

articulate a legitimate, non-discriminatory rationale for the discharge. If the employer does so, the burden shifts back to the plaintiff to prove that the employer's asserted reason is pretextual. See Anderson, 675 F.2d at 1224.

This court has discussed many times the relationship between the McDonnell Douglas standard for proving age discrimination and the grant of summary judgment. See e.g., Mauter v. Hardy Corp., 825 F.2d 1554 (11th Cir. 1987); Grigsby v. Reynolds Metals Co., 821 F.2d 590 (11th Cir. 1987); Barnes, 814 F.2d at 608-610; Pace v. Southern Ry. Sys., 701 F.2d 1383b (11th Cir.), cert. denied, 464 U.S. 1018, 104 S.Ct. 549, 78 L.Ed.2d 724 (1983). In particular, the fact that a plaintiff has established a prima facie case does not in and of itself

foreclose the possibility of summary judgment being granted in favor of the employer. See Pace, 702 F.2d at 1391. With regard to establishing pretext:

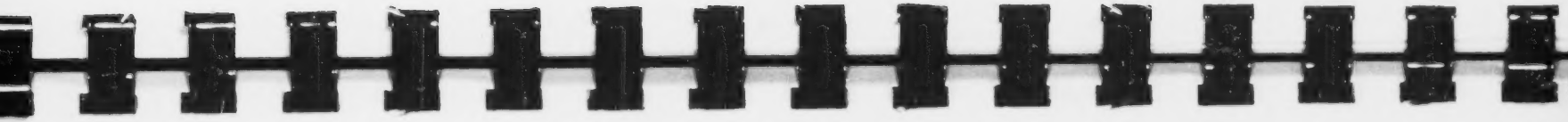
> A Plaintiff, when faced with a motion for summary judgment, . . . must respond sufficiently to any rebuttal by the defendant to create a genuine issue of material fact. Even where a prima face case has been established but the defendant has rebutted with a proffer of legitimate, non discriminatory reasons for the discharge, a genuine issue of material fact is not automatically presented . . . [O]nce a prima facie case creates a rebuttable presumption

> of discrimination; but this presumption alone does not create an inference that a material fact, sufficient to present a jury question, is in issue.

Id.; see also Halsell v. Kimberly Clark Corp, 683 F.2d 285, 291 (8th Cir. 1982), cert. denied, 459 U.S. 1205, 103 S.Ct. 1194, 75 L.Ed.2d 438 (1983). Because the plaintiff bears the burden of establishing pretext, he must present "significantly probative" evidence on the issue to avoid summary judgment. See Celotex 477 U.S. at ---, 106 S.Ct. at 2511.

B. Direct Evidence

[4] Before proceeding to our discussion of pretext, we confront initially Young's claim that he produced direct evidence of discrimination.



According to Young, Biltgen's oral and written comments that Young lacked the "wherewithal" to perform his job, "moved in slow motion," and was "not proactive," "not aggressive," and approximately the same age as Biltgen's father all constitute direct evidence of discrimination. We do not agree.

It is clear that not every comment concerning a person's age presents direct evidence of discrimination. See, e.g., Barnes, 814 F.2d at 610-11 (statement that plaintiff would have to take another physical examination "and at your age, I don't believe you could pass it," while "inappropriate and condescending," was not direct evidence of discrimination); see also Mauter, 825 F.2d at 1558; Chappell v. GTE PRoducts Corp., 803 F.2d

261, 268 n. 2 (6th Cir. 1986), cert. denied, --- U.S. ---, 107 S.Ct. 1375, 94 L.Ed.2d 690 (1987). Here, the majority of Biltgen's comments do not even directly concern Young's age. Rather the remarks in the evaluation that Young lacked the wherewithal to adequately perform his jog, moved in slow motion, and was neither aggressive nor "proactive," at most referred only to characteristics sometimes associated with increasing age. As this court has stated, "Congress made plain that the age statute was not meant to prohibit employment decisions based on factors that sometimes accompany advancing age, such as declining health or diminished vigor and competence." Barnes, 814 F.2d at 611 (quoting Loeb v. Textron, Inc., 600 F.2d 1003, 1016 (1st Cir. 1979)) (emphasis added).

Equally as important, the remarks are not directly probative of an intent to discriminate. This is not a case where Biltgen told Young that he would be fired because he was too old. See Castle v. Sangamo Weston, INc., 837 F.2d 1550, 1558 n. 13 (11th Cir. 1988) (discussing "direct" evidence of discrimination). Instead, it is a case where the plaintiff has inferred that certain factually neutral comments referred to his age in a discriminatory fashion. However, in evaluating any salesman's performance, statements regarding individual's aggressiveness, enthusiasm, and vigor are hardly surprising. In addition, a statement merely comparing someone's age with that of another is insufficient to constitute direct evidence of discrimination.

There was not evidence addressed that Biltgen thought of his father as being old. In fact, as Young readily admitted, the reason he believed the comment referred negatively to his age was because his own children thought of him as old. Based on this record, we conclude that the district court properly rejected Young's claim that he produced direct evidence of discrimination by Biltgen. The probative value of Biltgen's statements simply is too attenuated to be of legal significance in this case.

C. Pretext

[5] Assuming arguendo that Young established a prima facie case under McDonnell Douglas, the burden then shifted to General Foods to articulate a legitimate, non-discriminatory reason

for Young's discharge. In rebuttal, the company produced overwhelming evidence that Young was terminated because of poor job performance. Young admits that his supervisors, beginning with Bell, formulated written objectives ("contracts") for the TSMs and discussed them with the TSMs in advance. Young also does not dispute Bell's 1981 evaluation comments critical of Young's budget figures, conscientiousness, and performance of administrative tasks. Biltgen several times asked Young to develop a new sales plan. Rather than doing so, however, Young continued to rely on past relationships for the most part in making sales. As a result, some of Young's customers were the only ones in the region not stocking certain products. In addition, Young concedes that, after being requested to do so, he

failed to submit any merchandising ideas or conduct any business review presentations, forcing Biltgen to perform those tasks himself. Young's damaged merchandise expenses also were the highest in the region. Finally, statistical information contained in the written evaluations repeatedly showed Young's sales and business volume to be below that of the region average. Although Young disputes the accuracy of some of the figures, the majority of the information remains uncontested.

In his attempt to produce "significantly probative" evidence of pretext, Young states in his affidavit that his sales figures were good and his work performance was satisfactory. Young also sates that his termination was due to age because he could not

"imagine what expectations he did not achieve except possibly being a man of age 25 to 30." In addition, Young claims that some of the sales figures are inaccurate and that Biltgen's recomputation of one set of volume figures, as well as his offer of retirement, evidence discriminatory intent. We do not believe this evidence to be sufficiently probative of pretext to withstand a motion for summary judgment.

"[C]onclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination where [an employer] has offered . . . extensive evidence of legitimate, non-discriminatory reasons for its actions." Grigsby, 821 F.2d at 597. Although Young contends that he performed the job

satisfactorily at all times and was a victim of discrimination, he does not contest most of the objective negative statistical information contained in the written evaluation. For the numbers he does dispute, Young provides no link between the purported inaccuracy and age discrimination. Significantly, in one case, although Young disputes the accuracy of the value used, he does not deny the "bottom line" information, that his volume contribution slipped during the covered time interval. In the other, Young admits that he does "not have the figures to prove [that Biltgen] was wrong." Although Young also has pointed to Biltgen's recomputation of certain figures in one written report, Young does not dispute that he was the only TSM in the region selling the new

CRYSTAL LIGHT beverage. It is certainly understandable that a manager might delete those sales figures when comparing Young's performance against others not fortunate (or unfortunate) enough to be test-merchandising a new product. In this situation, the fact that Young was treated differently is of little value in inferring pretext, because he was situated differently than the other TSM's irrespective of age.

[6] Finally, we believe that Biltgen's offer of retirement to Young is not probative of discriminatory intent in this case. Here there is no dispute that Biltgen decided to fire Young before offering him the alternative choice of retirement. If Young had been fired after having been requested to retire, the earlier retirement offer might in some cases

allow an inference that age was a determinative factor in the termination. See, e.g., J.C. Penney Co., 803 F.2d 202, 205 (5th Cir. 1986). However, once the decision to fire Young had been made, Biltgen's offer, rather than suggesting pretext, tends to show a desire to provide Young with an opportunity to avoid the stigma associated with having been fired.

In sum, this is much like the case in Grigsby, 821 F.2d at 597:

> This is not a situation where, as [the plaintiff] contends, the district court impermissibly weighed the parties' evidence instead of looking for the existence of a genuine issue of fact. Where the defendant's justification evidence completely overcomes

> any inference to be drawn from the evidence submitted by the plaintiff, the district court may properly acknowledge that fact and award summary judgment to the employer.

See also Mauter, 825 F.2d at 1558; Simmons v. McGuffey Nursing Home, Inc., 619 F.2d 369, 3371 (5th Cir. 1980.

The judgment of the district court is AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

HOWARD YOUNG,

Plaintiff,

vs.

GENERAL FOODS CORPORATION,

Defendant.

Case No. 86-900-Civ-J-12

ORDER

Plaintiff Howard Young was terminated from his position with defendant General Foods Corporation on December 1, 1983. At the time of his discharge, plaintiff was fifty-nine years of age and had been an employee of defendant for over twenty-three years. Plaintiff was replaced by an individual who was twenty-six at the time he assumed plaintiff's former job. Based on these facts, plaintiff brought an

action against defendant, pursuant to the Age Discrimination in Employment Act, 29 U.S.C Section 621, et seq. ("ADEA"). After the close of discovery, defendant moved for summary judgment, arguing alternatively that plaintiff had failed to establish all of the elements essential to his case and that the action was barred by the statute of limitations. The Court has carefully considered the arguments of defendant and those contained in plaintiff's response in opposition to the motion for summary judgment. Upon such consideration, the Court has concluded that summary judgment for defendant is warranted, based on plaintiff's failure to establish an essential element of his case. While the Court will fully articulate the reasons for its decision in the order which follows, this ruling

eliminates the need for the Court to address the statute of limitations question raised by defendant.

The law applicable to cases brought under the ADEA is quite well-settled. To begin with, a plaintiff in such a suit has the initial burden of establishing a prima facie case using the formula that has come to be known as the Price/McDonnell Douglas test. This four-part test requires plaintiff to show (1) that he was a member of the protected class; (2) that he was discharged; (3) that he was qualified for the job; and (4) that he was replaced by a person outside the protected age group. See, e.g., Pace v. Southern Railway System, 701 F.2d 1383 (11th Cir.), cert. denied. 464 U.S. 1018 (1983). Once plaintiff establishes

a prima facie case, the burden shifts to defendant to articulate a legitimate, non-discriminatory reason for plaintiff's discharge. See, e.g., Goldstein v. Manhatten Industries, Inc., 758 F.2d 1435 (11th Cir.), cert. denied, 106 S.Ct. 525 (1985). Assuming defendant comes forward with a legitimate explanation for plaintiff's discharge, the burden of proof then returns to plaintiff who must show that defendant's proffered explanation is merely a pretext for age discrimination. See, e.g., Horn v. Bibb County Commission, 713 F.2d 689 (11th Cir. 1983).

The law applicable to motions for summary judgment is also well-settled and indeed, recently has been clarified by the United States Supreme Court. In Celotex v. Catrett, 106 S.Ct.

2548, 2552-53 (1986), the Court noted that the entry of summary judgment was appropriate "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that part will bear the burden of proof at trial. This interpretation of Fed. R. Civ. P. 56(c) is logical because "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims . . . ." Id. at 2553. In Anderson v. Liberty Lobby, inc., 106 S.Ct. 2505 (1986), the Supreme Court further elaborated on its view of rule 56(c), equating the standard for summary judgments with that for directed verdicts. The Court noted

that "there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." Id. at 2511 (citations omitted).

With all of the above-noted principles in mind, the Court now turns to defendant's argument that plaintiff has not come forward with sufficient evidence to withstand a motion for summary judgment. Defendant contends that, even assuming plaintiff can establish a prima facie case, defendant has effectively rebutted the inference of age discrimination by articulating a legitimate reason for plaintiff's discharge -- substandard job performance. This rebuttal, defendant argues,

requires plaintiff to come forward with some probative evidence showing that defendant's explanation for plaintiff's discharge is a pretext for discriminatory conduct. Under the case law cited above, the Court believes that defendant has correctly interpreted the onus plaintiff must bear at this juncture. A review of the evidence proffered by plaintiff is thus in order.

To begin with, plaintiff attempts to expose as pretextual defendant's complaints about his job performance by an affidavit in which plaintiff states that his sales figures were good and his work performance was satisfactory. See Plaintiff's Exhibit A. Plaintiff's affidavit also states his belief that his termination was due to age because he could not "imagine

what expectations [he] did not achieve except possible being a man of age 25 to 30." Id.

The Court does not accord much weight to these statements. The law is clear that plaintiff's subjective belief of discrimination, however genuine, cannot form the basis of judicial relief. See Simmons v. McGuffey Nursing Home, Inc., 619 F.2d 369, 371 (5th Cir. 1980). See also Elliot v. Group Medical & Surgical Service, 714 F.2d 556 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984); Ackerman v. Diamond Shamrock Corp., 670 F.2d 66 (6th Cir. 1970). Furthermore, the facts of record simply do not support plaintiff's contention that the substandard evaluations he received resulted from the discriminatory motives of his supervisor, Mr. John Biltgen. In an evaluation written by

plaintiff's past supervisor, Mr. R. L. Bell, plaintiff's "tendency to become lax at times" was commented upon, as was his failure to exceed budget projections for two of the fiscal year's for quarters. See Plaintiff's Exhibit B. The Court would also note that plaintiff's unfavorable evaluations from Mr. Biltgen were in large part based on objective, statistical figures. Finally, plaintiff admits that he disagreed with Mr. Biltgen's approach to making sales calls, plaintiff's deposition at 117, and did not change his selling methodology in most cases, id. at 173, in spite of the fact that Mr. Biltgen suggested he do so. Id. at 131, 135. In sum, aside from plaintiff's subjective statements, there is no evidence of record showing that plaintiff's job

performance was satisfactory during the period in which defendant states that it was substandard.

Next, plaintiff contends that certain statements made by Mr. Biltgen constitute direct evidence of discrimination. In his deposition, plaintiff noted that "Mr. Biltgen put in my many, many reviews that I worked in slow motion, that I was not proactive, something to the effect that I didn't have the wherewithal, which was a favorite word of his, and aggressive. I wasn't aggressive. And words to that effect." Id. at 99-100. Plaintiff also stated that while Mr. Biltgen never told him that he was an old man, Mr. Biltgen did compare him in age with Mr. Biltgen's father. Id. at 100-01.

Assuming for the purposes of this order that Mr. Biltgen made the

statements attributed to him by plaintiff, the Court does not believe that such statements constitute direct evidence of discrimination. In evaluating a salesman's performance, comments regarding the individual's aggressiveness, or lack thereof, are hardly surprising. And, as the Eleventh Circuit recently noted, "the age statute was not meant to prohibit employment decisions based on factors that sometimes accompany advancing age, such as declining health or diminished vigor and competence." (Emphasis added). Barnes v. Southwest Forest, Inc., 814 F.2d 607, 611 (11th Cir. 1987) (affirming summary judgment for defendant in an ADEA case; statement that plaintiff could not pass a physical exam at his age was "inappropriate and

condescending," but not direct evidence of discrimination".

It is apparent from the foregoing discussion that the record in this case is devoid of evidence tending to show that defendant's explanation for plaintiff's discharge is pretextual. Since plaintiff is thus unable to establish an element essential to his case, summary judgment for defendant is warranted.

Accordingly it is

ADJUDGED:

1. That defendant's motion for summary judgment is hereby granted; and

2. That the Clerk of the Court is hereby directed to enter judgment in favor of defendant and against plaintiff.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 9th day of

June 1987.

/s/Howell W. Melton
UNITED STATES DISTRICT JUDGE

STATUTES

29 U.S.C Section 623(a).

Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer-

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of

any employee in order to comply with this chapter.

Supreme Court, U.S.
FILED
JUL 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-2072

In The
Supreme Court of the United States
October Term, 1987

HOWARD YOUNG,

Petitioner,

v.

GENERAL FOODS CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether the Eleventh Circuit Court of Appeals applied the proper standards when it evaluated the decision of the District Court to grant the employer's motion for summary judgment in an age discrimination claim.

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STATEMENT OF THE CASE

On March 21, 1988, a unanimous panel of the Court of Appeals for the Eleventh Circuit affirmed a grant of summary judgment for General Foods Corporation ("Respondent").[1] It held that Howard Young ("Peitioner") had not established an essential element of his case; he did not introduce evidence to show that Respondent's reasons for discharging him were a pretext for age discrimination. (Appendix to Petition for a Writ of Certiorari to the United States Courts of Appeals for the Eleventh Circuit (hereinafter "App."), p. 7).

Petitioner recites a number of allegations concerning his job performance without any citation or reference to a record (Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit (hereinafter "Petition"), pp. 10-11). Respondent disputes Petitioner's allegation that he held "essentially the same sales representative position" for over twenty years (Petition, p. 10). Petitioner became a military sales representative for Respondent in 1963 (App. 7). Respondent upgraded all military sales representatives' positions to Territory Sales Managers and increased the salary grade because of substantial changes in the military sales sector (App. 7-8). Respondent disputes Petitioner's allegation that he "usually ranked in the middle among the other territorial sales managers" (Petition, p. 11). At about the same time that Respondent upgraded the positions, Petitioner's supervisor noted that Petitioner "tended to become lax at times" and failed to exceed budget projections for two of the four quarters (App. 42).

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1 General Foods Corporation is a subsidiary of Philip Morris Companies, Inc.

In April 1982, Respondent assigned a new supervisor to the southeast region where Petitioner worked (App. 7, 9). Between April and November 1982, Petitioner's supervisor told him several times to develop a new plan of action for sales presentations; there is no dispute that Petitioner did not develop any new plans (App. 9, 42). In October 1982, Petitioner received a six month evaluation for the fiscal year which noted that his volume growth did not keep pace with the growth in other southeast territories and that his performance did not meet expectations (App. 10-11). In November 1982, Respondent placed Petitioner on probation and told him that he would be subject to termination unless he showed substantial progress by May 1983 (App. 11).

In May 1983, Petitioner received an evaluation for the fiscal year, which showed that his sales and budget performance continued to rank below the region's average; he remained on formal probation (App. 11-12). In November 1983, Petitioner's supervisor again evaluated his performance and noted that some of Petitioner's customers were the only ones who did not stock certain items, that Petitioner did not complete sales presentations and did not present any business building ideas (App. 12). An illusory improvement in Petitioner's volume figures was due to sales of a product that was sold only in Petitioner's territory (App. 13). When his supervisor recomputed the volume figures without this product, to more accurately compare Petitioner's performance vis-a-vis the other Territory Sales Managers, Petitioner's volumes were last in the region (App. 13).

As a result of his unsatisfactory performance, Respondent notified Petitioner in a memorandum dated No-

vember 14, 1983 that he would be discharged (App. 13-14). Petitioner's supervisor did not advise Petitioner that he "would change his mind concerning [Petitioner's] termination" if he would retire, as Petitioner alleges (Petition, pp. 11-12). Respondent only offered Petitioner the opportunity to retire to avoid being discharged (App. 31-32). When Petitioner refused, Respondent discharged him effective December 1, 1983 and assigned a person younger than Petitioner to the Territory Sales Manager position (App. 14, 34).

SUMMARY OF ARGUMENT

This Court should not grant a writ of certiorari because the Eleventh Circuit Court of Appeals precisely applied the standards established by the United States Supreme Court to evaluate an employment discrimination claim and to review the appropriateness of a grant of summary judgment. Further, the cases that Petitioner cites in an effort to create a "conflict" in the decisions of the courts of appeals show no conflict because each case presents facts that are easily distinguishable from the instant case.

ARGUMENT

POINT I

NO SPECIAL AND IMPORTANT REASONS EXIST FOR A WRIT OF CERTIORARI BECAUSE THE ISSUE BEFORE THE ELEVENTH CIRCUIT COURT OF APPEALS HAS BEEN SETTLED BY THIS COURT AND THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH THE APPLICABLE DECISIONS OF THE SUPREME COURT.

A. The United States Supreme Court Has Rejected The Standard For Summary Judgment That Petitioner Argues Should Apply.

The United States Supreme Court has noted that summary judgment procedures should not be considered as a "disfavored procedural shortcut, but rather as an integral part of the Federal Rules . . . designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). *Accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

Without mentioning these Supreme Court decisions, Petitioner asserts that the Fifth Circuit, in a case decided before *Celotex, Anderson* and *Matsushita*, set forth "the proper role of summary judgment in an employment discrimination case," when it held that summary judgent was generally inappropriate in employment discrimination claims that involve motive and intent. *Thornbrough v. Columbus and Greenville Railroad Company*, 760 F.2d 633, 640 (5th Cir. 1985). In *Thornbrough*, the Fifth Circuit Court of Appeals reversed summary judgment for the employer, despite the sparseness of the plaintiff's proof be-

cause "through the dim mists, we perceive a thin vapor." *Thornbrough, supra,* at 648.

The Supreme Court soundly rejected the guidelines enunciated in *Thornbrough* when it decided *Anderson, Celotex* and *Matsushita.* In *Anderson,* this Court held that the standard for granting summary judgment mirrors the standard for a directed verdict. *Anderson, supra,* at 250. As a result, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 252. This standard for summary judgment applies even in a case in which "state of mind is at issue." *Id.* at 256.

Thus, the *Thornbrough* decision does not set forth the proper standards for summary judgment. A scintilla or thin vapor of evidence is not sufficient to overcome a motion for summary judgment. The court below appropriately ignored *Thornbrough.* The Eleventh Circuit properly applied the standards set forth by the Supreme Court when it evaluated the evidence presented by Petitioner in his attempt to show that Respondent's legitimate, nondiscriminatory reason was pretextual.

B. The Eleventh Circuit Applied The Proper Standard In Evaluating Whether Petitioner Set Forth Specific Facts To Show The Existence Of A Genuine Issue For Trial.

Petitioner grossly distorts the record when he claims that the court below noted that since he "had held his position for some period of time, it would be inferred that his job performance was sufficiently satisfactory to present a prima facie case" (Petition, pp. 14-15). In foot-

note 3 (which, along with all other footnotes, was omitted from the court's decision set forth in Petitioner's Appendix), the Eleventh Circuit Court of Appeals noted that when a plaintiff has held a job for a long period of time, the court may infer that he was qualified for the job. *Young v. General Foods Corp.*, 840 F.2d 825, 829-30 n.3 (11th Cir. 1988). However, the court went on to hold that "because General Foods has asserted poor job performance as its reason for firing Young, *we need not decide* whether Young is entitled to an inference of qualification." *Id.* (emphasis added).

The court below then focused on whether there was sufficient evidence of poor performance and whether Petitioner submitted sufficient evidence to show that the reason for discharge was merely a pretext for age discrimination. *Id.* This is consistent with the burdens and order of proof set forth in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The Eleventh Circuit ruled that Respondent had submitted "overwhelming evidence" that it discharged Petitioner for poor performance (App. 27). Citing *Celotex* and *Anderson*, the court held that Petitioner then had to present probative evidence of pretext to avoid summary judgment (App. 22). All that Petitioner produced was an affidavit in which he made unsubstantiated claims that his sales figures were good and his work performance was satisfactory (App. 28). Essentially, he simply alleged that some sales figures were inaccurate, that his supervisor recomputed one set of volume figures and that his supervisor offered him the option to retire rather than be discharged (App. 29).

Although Petitioner claimed that some sales figures were inaccurate, he did not contest most of the objective information in the evaluations and even admitted that he could not prove that his supervisor was wrong (App. 29-30). In response to the overwhelming evidence of poor performance, Petitioner actually contested only *two* figures (App. 30). In one case, although Petitioner contested the value that was used, he did not deny that the bottom line was correct, that is, his volume contribution had slipped (App. 30).

In the other case, Petitioner's supervisor had recomputed figures in only one instance by deleting sales figures of a new product that Petitioner was test-merchandising in his area (App. 30-31). Petitioner did not dispute that he was the only Territory Sales Manager in the region who was selling the new product (App. 30-31). The supervisor deleted the new product sales figures to more accurately compare Petitioner's sales figures and volumes with those of other Territory Sales Managers who did not sell the product (App. 31).

Finally, Petitioner did not dispute that his supervisor suggested that Petitioner retire only after the supervisor had decided to discharge Petitioner (App. 31). Thus, the offer to allow Petitioner the opportunity to retire had no connection with the decision to discharge him (App. 31-32).

The court below properly determined that Petitioner did not come forward with any probative evidence that Respondent's legitimate, nondiscriminatory reason was pretextual. At most, he presented only conclusory allegations. Because he did not "establish the existence of an element essential to [his] case," and on which he had the burden of proof at trial, summary judgment was required.

Celotex, supra, at 323. The Court of Appeals properly evaluated Petitioner's claim as required by *Burdine,* the Federal Rules of Civil Procedure and the Supreme Court's interpretation of those Rules.

C. Petitioner Was Not Deprived Of The Opportunity To Cross-Examine Witnesses.

Citing *Burdine,* Petitioner argues that pretext may be demonstrated by effective cross-examination of the employer's witnesses and that the entry of summary judgment deprived him of the opportunity to cross-examine the witnesses (Petition, p. 16).[2] Petitioner's argument is specious. Respondent did not move for summary judgment until after the close of discovery (App. 35). Petitioner had every opportunity to cross-examine Respondent's witnesses by taking depositions during discovery and in fact, he did. Petitioner even had the opportunity to take the depositions in the district where he filed suit.[3]

Petitioner's argument, if accepted, would eliminate summary judgment and permit trial of even the most frivolous claims if the plaintiff's lawyer simply avoided

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2 Petitioner apparently derives this argument from a footnote in *Burdine* despite his omission of the footnotes in the decision of the court below. The *Burdine* court noted that "there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." *Burdine, supra,* at 255 n. 10.

3 The local court rules provide that:

> It is the general policy of the Court . . . that a non-resident defendant who intends to be present in person at trial may reasonably be deposed at least once in this District either during the discovery stages of the case or within a week prior to trial.

Rule 3.04(c), Rules of the United States District Court for the Middle District of Florida.

discovery. Such a result hardly secures "the just, speedy and inexpensive determination of every action." Fed. R. Civ. P. 1; *Celotex, supra,* at 327. It fails "to isolate and dispose of factually unsupported claims." *Celotex, supra,* at 323-324. It also ignores the clear requirement of the Federal Rules that, to avoid summary judgment, Petitioner "must set forth specific facts showing that there [was] a genuine issue for trial." Fed. R. Civ. P. 56(e); *Anderson, supra,* at 250. Speculation about what Petitioner might elicit during cross-examination does not constitute "specific facts." When a party opposing summary judgment does not respond with specific facts as Petitioner did not, the Federal Rules require that summary judgment be entered against him. Fed. R. Civ. P. 56(e); *Celotex, supra,* at 323.

Thus, this Court has settled the question of when summary judgment is appropriate. The unanimous decision of the Eleventh Circuit Court of Appeals panel is entirely consistent with the applicable decisions of this Court and there is no reason for this Court to issue a writ of certiorari to review the decision of the court below.

POINT II

PETITIONER DID NOT ESTABLISH THAT THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISION OF ANOTHER COURT OF APPEALS BECAUSE EACH CASE CITED BY PETITIONER PRESENTED FACTS THAT ARE EASILY DISTINGUISHABLE FROM THE FACTS OF THE INSTANT CASE.

A. This Court Should Not Issue A Writ Of Certiorari To Resolve A Conflict Within A Circuit.

Petitioner compares his case to *Rosenfield v. Wellington Leisure Products, Inc.*, 827 F.2d 1493 (11th Cir. 1987).

Such a comparison is inappropriate because the facts in *Rosenfield* are dramatically different from those in the instant case.[4] Further, even if there were a lack of uniformity in the decisions of the Eleventh Circuit, it does not constitute a reason for review by this Court. See Sup. Ct. R. 17. It is the Court of Appeals' task to reconcile intra-circuit conflicts. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957). Petitioner should have requested a rehearing by the panel pursuant to Fed. R. App. P. 40(a) or a hearing by the Court of Appeals in banc. Fed. R. App. P. 35(a); 11th Cir. R. 35-3.

B. The Cases Relied Upon By Petitioner Do Not Establish A Conflict With The Decision Of Another Circuit.

In an attempt to show a conflict among the courts of appeals, Petitioner compared the decision of the court below with *Gilkerson v. Toastmaster, Inc.*, 770 F.2d 133 (8th Cir. 1985); *Stacey v. Allied Stores Corp.*, 768 F.2d 402 (D.C. Cir. 1985); and *Reeves v. General Foods Corp.*, 682 F.2d 515 (5th Cir. 1982). These cases fail to show that any conflict exists among the courts of appeals because the cases do not apply a different rule of law from that applied by the Eleventh Circuit Court of Appeals and in each cited case, the plaintiff presented probative evidence on the issue of pretext. In the instant case, Petitioner did not present any probative evidence.

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4 In *Rosenfield*, there was evidence that (1) the plaintiff had an extraordinary work record; (2) evidence of poor work performance was created after the discharge; (3) the reason for discharge (failure to complete a project on time) was pretextual because the project was not due until after the discharge; and (4) the employer treated younger workers differently when they had performance issues. *Rosenfield, supra*, at 1496.

Petitioner notes that the *Gilkerson* court "held that the mere articulation of an alleged legitimate non-discriminatory reason does not entitle the defendant to a judgment NOV" (Petition, p. 21). That holding is entirely consistent with the Eleventh Circuit's decision in the instant case. Respondent's articulation of a legitimate, nondiscriminatory reason did not end the analysis for the court below. The court examined Petitioner's "evidence" of alleged pretext and found that there was no probative evidence and no genuine issue for trial (App. 32-33).

In contrast, the *Gilkerson* plaintiff introduced specific facts as evidence of pretext. The employer's articulated reason for discharge was plaintiff's alleged unsatisfactory sales performance, poor customer relations, lack of motivation and failure to work closely with accounts. Unlike the instant case, the *Gilkerson* plaintiff produced evidence that six years before discharge, he was one of two top salesmen; two years before discharge, he was the top salesman in his region; none of the other salesmen made their quotas; and the plaintiff had good customer relations according to the testimony of three customers. *Gilkerson, supra,* at 136. Thus, there is no conflict between the *Gilkerson* decision and that of the court below.

There is also no conflict between the *Stacey* case and the instant case. Petitioner again distorts the facts when he implies that the only issue in *Stacey* concerning pretext was the credibility of the employer's witnesses (Petition, p. 23). There was a great deal more than that.

When Stacey's job was eliminated in an office closing, the employer did not consider him for other jobs because of alleged unsatisfactory performance. *Stacey, supra,* at 404. However, the plaintiff introduced evidence that the

employer had never articulated the alleged poor performance at any time before trial, not even in its response to the District of Columbia Office of Human Rights; there was also substantial, uncontroverted testimony that the plaintiff was a highly respected manager who had received recognition from senior management. *Id.* at 407. Credibility became an issue because of evidence that the plaintiff's supervisor had personal animosity towards the plaintiff and, on a number of occasions, had said how he was proud of his "cadre of young chargers." *Id.* at 408. The evidence in *Stacey* was very different from that in the instant case, in which Petitioner did not introduce probative evidence to show pretext. Thus, the cases do not conflict.

Finally, the *Reeves* case does not conflict with the instant case. Like the Eleventh Circuit, the *Reeves* court required the plaintiff "to introduce substantial evidence" that the employer's articulated reasons were pretextual. *Reeves, supra,* at 523. Unlike Petitioner, Reeves presented evidence that he had received a good evaluation and a recommendation for a substantial salary increase only months prior to his discharge; he had received several memoranda praising his performance during the period when it was supposed to have been unsatisfactory. *Id.* at 524. The only customers who testified, stated that Reeves' performance was good. *Id.*

Petitioner presented no evidence like that produced by the plaintiffs in *Gilkerson, Stacey* and *Reeves.*[5] As a

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5 Petitioner did argue that he had received raises and bonuses during his career (Petition, p. 18). While that may be

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result, these cases are readily distinguishable and do not show that a conflict exists among the courts of appeals. Thus, there is no reason for this Court to review the decision of the Eleventh Circuit in this case.

CONCLUSION

The District Court and the Eleventh Circuit Court of Appeals correctly applied the law according to *Burdine* when they required Petitioner to come forward with probative evidence to rebut Respondent's legitimate, nondiscriminatory reason for discharging him. When Petitioner failed to present specific facts to challenge Respondent's substantial evidence of poor performance, summary judgment was properly granted for Respondent. The Eleventh Circuit, following this Court's instruction in *Anderson*, *Celotex* and *Matsushita*, applied the proper standard in evaluating and affirming the grant of summary judgment.

Petitioner has failed to show that the Eleventh Circuit's decision conflicts with a decision of this Court or of another court of appeals. The facts in the cases that Petitioner cites are readily distinguishable from the facts in the instant case.

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true, the Eleventh Circuit noted that all Territory Sales Managers received bonuses in equal amounts, based on overall region performance, not individual performance (App. 8).

No special and important reasons exist for this Court to review the Eleventh Circuit Court of Appeals' decision. For the reasons set forth above, this Court should not issue a writ of certiorari.

Respectfully submitted,

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